

The Administrative Law Judge (ALJ) found the claimant sustained a 5 percent scheduled injury to her right upper extremity.

The claimant requests review of nature and extent of disability. Claimant argues she has sustained her burden of proving that she suffered bilateral upper extremity and shoulder injuries as well as neck injuries due to her work-related accident on April 25, 2002. Accordingly, claimant contends she has suffered a whole person impairment and as previously noted, claimant further argues she is entitled to a 34 percent work disability.

Respondent argues the medical evidence indicates the claimant was treated for her right upper extremity only and therefore the ALJ's Award should be affirmed.

The sole issue raised on review is the nature and extent of claimant's disability. Specifically, whether she suffered a scheduled disability or a whole person impairment which would entitle her to a work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Initially, it must be determined whether claimant suffered scheduled or non-scheduled injuries. The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent partial general disability.¹ It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.² The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.³

The claimant began experiencing problems with her right upper extremity in April 2002 and was provided treatment. The treatment focused on claimant's right upper extremity. Pain diagrams completed by claimant from May 2002 through October 2002 all indicated symptoms in the right upper extremity.

¹ K.S.A. 44-510d; K.S.A. 44-510e.

² *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Dr. J. Douglas Gardner, a specialist in rheumatology, examined and evaluated the claimant on January 23, 2003 and noted claimant's pain complaints were limited to her right hand and shoulder. He further noted she did not make any left upper extremity complaints. Based upon claimant's physical examination, the doctor opined the claimant did not have fibromyalgia or rheumatology problems. He further opined he did not find Raynaud's Sympathetic Distrophy (RSD) or thoracic outlet disorders.

Q. Okay. The pain complaints she gave to you when you talked with her were in the right hand and right shoulder area, is that correct?

A. That's my understanding from reviewing my records, correct.

Q. Okay. And she didn't complain about her left upper extremity, correct?

A. That's the best of my knowledge, yes.⁴

Claimant saw Dr. Joseph G. Sankoorikal on March 5, 2003, and her complaints were again limited to her right upper extremity. She denied any similar symptoms on the left side. After a preliminary hearing, Dr. Sankoorikal was authorized to provide treatment for claimant's right upper extremity.

Dr. Sergio Delgado, board certified orthopedic surgeon, examined, evaluated and rated the claimant on June 29, 2004. The doctor diagnosed the claimant with tendonitis in both wrists. Dr. Delgado assigned a 3 percent impairment to each of the claimant's wrists. Each 3 percent upper extremity impairment converts to a 2 percent whole person impairment. Combining the 3 percent for the right posterior shoulder girdle and the 2 percent for the right wrist results in a 5 percent whole person impairment to the right upper extremity. The 2 percent for the tendonitis in the left wrist combined with the 5 percent whole person impairment results in a 7 percent whole person impairment. The doctor restricted the claimant from pushing and pulling not to exceed 25 pounds repetitively, 50 pounds occasionally as well as lifting greater than 20 pounds repetitively and 30 pounds occasionally. He also recommended the claimant avoid activities requiring overhead work.

The Board notes that before claimant was examined by Dr. Delgado she had worked for several employers after she was terminated from her job with respondent and her work activities as a server and food preparer at restaurants as well as making doors on mail boxes all involved some repetitive use of her upper extremities.

Dr. Michael J. Poppa examined and evaluated the claimant on March 15, 2005. Upon examination, the claimant was complaining of right upper extremity problems including the shoulder. The doctor testified the claimant did not make complaints regarding the left upper extremity. Dr. Poppa opined the claimant had reached maximum medical

⁴ Gardner Depo. at 12.

improvement with regard to the right upper extremity overuse syndrome. Based upon the *AMA Guides*⁵, the doctor rated the claimant's right upper extremity at no more than 5 percent due to symptoms. Dr. Poppa did not place any permanent restrictions on the claimant. He testified as follows:

Q. As part of your evaluation of records, was it your understanding that previously Dr. Delgado in Topeka, Kansas, found this claimant to have a body-as-a-whole injury as a result of some muscular-type complaints within her back?

A. That was his opinion.

Q. Did you agree with that?

A. No.

Q. Why [is] that?

A. Ms. Jones did not have any complaints involving her back and her physical examination did not reveal any findings consistent with myofascial syndrome or complaints involving her back.⁶

On cross-examination, the doctor again opined the claimant did not show any physical evidence of problems or tendonitis involving her left upper extremity nor did she voice any complaints regarding the left upper extremity.

The ALJ found Dr. Poppa's opinion more persuasive than Dr. Delgado. The ALJ noted:

The Court is not persuaded by the opinion of Dr. Delgado, which appears to rely primarily upon subjective symptoms. These symptoms were largely absent by the time Dr. Poppa examined the Claimant eight months later, suggesting such symptoms had never existed or the Claimant's condition had improved in the intervening period.⁷

The Board agrees and affirms.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁶ Poppa Depo. at 7.

⁷ ALJ Award at 4.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 9, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Michael P. Bandré, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director